

Assembly Bill No. 2293

CHAPTER 779

An act to amend Sections 12100 and 12103 of, to repeal and add Section 12104 of, and to add Sections 12105, 12106, 12107, and 12108 to, the Financial Code, and to amend Section 13978.6 of the Government Code, relating to credit counseling.

[Approved by Governor September 21, 2002. Filed with Secretary of State September 22, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2293, Liu. Consumer credit counseling organizations.

The Check Sellers, Bill Payers and Proraters Law provides for licensing and regulation by the Commissioner of Corporations of various licensees. That law provides for licensing and regulation of proraters, defined as persons who receive money from a debtor for the purpose of distributing the money among the debtor's creditors in full or partial payment of the debtor's obligations. Existing law provides an exemption from licensing and regulation under these provisions for certain nonprofit community service organizations that provide prorating services if those organizations comply with certain requirements.

This bill would establish new regulatory provisions exempting nonprofit community service organizations that engage in prorating activities from regulation if certain requirements are met. The new regulatory provisions would, among other things, authorize the commissioner to investigate violations of the Check Sellers, Bill Payers and Proraters Law, impose various civil penalties for a violation of that law, and would require moneys collected from certain penalties to be deposited in the State Corporations Fund. The bill would require the Department of Corporations to conduct a study of the consumer credit counseling industry in California and make certain recommendations to the Legislature by March 1, 2003.

The people of the State of California do enact as follows:

SECTION 1. Section 12100 of the Financial Code is amended to read:

12100. This division does not apply to any of the following:

(a) Persons or their authorized agents doing business under license and authority of the Commissioner of Financial Institutions of the State



of California under Division 1 (commencing with Section 99), or under any law of this state or of the United States relating to banks, trust companies, building or savings associations, industrial loan companies, personal property brokers, credit unions, title insurance companies or underwritten title companies (as defined in Section 12402 of the Insurance Code), escrow agents subject to Division 6 (commencing with Section 17000), or finance lenders subject to Division 9 (commencing with Section 22000).

(b) (1) Any person licensed under Chapter 14A (commencing with Section 1851) of Division 1 or any agent of such person when selling any traveler's check (as defined in Section 1852) which is issued by such person.

(2) Any person licensed under Division 16 (commencing with Section 33000) or any agent of the person, when selling any payment instrument (as defined in Section 33059) which is issued by the person.

(c) The services of a person licensed to practice law in this state, when the person renders services in the course of his or her practice as an attorney-at-law, and the fees and disbursements of such person whether paid by the debtor or other person, are not charges or costs and expenses regulated by or subject to the limitations of this chapter; provided, these fees and disbursements shall not be shared, directly or indirectly with the proratee or check seller.

(d) Any transaction in which money or other property is paid to a "joint control agent" for disbursement or use in payment of the cost of labor, materials, services, permits, fees, or other items of expense incurred in construction of improvements upon real property.

(e) A merchant-owned credit or creditors association, or a member-owned or member-controlled or member-directed association whose principal function is that of servicing the community as a reporting agency.

(f) Any person licensed under Chapter 1 of Part 6 of Division 2 of the Labor Code, when acting in any capacity for which he or she is licensed under that part.

(g) Any person licensed under Part 1, Division 4, of the Business and Professions Code, when acting in any capacity for which he or she is licensed under that part.

(h) A common law or statutory assignment for the benefit of creditors or the operation or liquidation of property or a business enterprise under supervision of a creditor's committee.

(i) The services of a person licensed as a certified public accountant or a public accountant in this state, when the person renders services in a course of his or her practice as a certified public accountant or a public accountant, and the fees and disbursements of the person, whether paid



by the debtor or other person, are not charges or costs and expenses regulated by or subject to the limitations of this chapter; provided, these fees and disbursements shall not be shared, directly or indirectly, with the prorater or check seller.

(j) Any person licensed under Chapter 14 (commencing with Section 1800) of Division 1 or any agent of such person, when selling any check or draft which is drawn by the person and which is of the type described in paragraph (3) of subdivision (a) of Section 1800.5.

(k) Any group of banks each of which is organized under the laws of a nation other than the United States and one or more of which are licensed by the Commissioner of Financial Institutions of the State of California under Article 3 (commencing with Section 1750) of Chapter 13.5 of Division 1, or any agent of such group, when selling any foreign currency traveler's check (as defined in Section 1852) issued by such group, provided that each bank that is a member of the group is jointly and severally liable to pay such foreign currency traveler's check.

(l) Any transaction of the type described in Section 1854.1.

SEC. 2. Section 12103 of the Financial Code is amended to read:

12103. Whenever in the opinion of the commissioner any person is engaged in business as a check seller as defined in this division without a license from the commissioner, or any person or licensee is violating any provision of this division, the commissioner may order the person or licensee to desist and to refrain from engaging in such business or further violating this division. If, after such an order is made, a request for a hearing is filed in writing and no hearing is held within 30 days thereafter, the order shall be deemed to have been rescinded.

SEC. 3. Section 12104 of the Financial Code is repealed.

SEC. 4. Section 12104 is added to the Financial Code, to read:

12104. A nonprofit community service organization that meets all of the following criteria shall be exempt from any requirements imposed on proraters pursuant to this division:

(a) The nonprofit community service organization incorporates in this state or any other state as a nonprofit corporation and operates pursuant to either the Nonprofit Public Benefit Corporation Law, Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code or the Nonprofit Mutual Benefit Corporation Law, Part 3 (commencing with Section 7110) of Division 2 of Title 1 of the Corporations Code.

(b) The nonprofit community service organization limits its membership to retailers, lenders in the consumer credit field, educators, attorneys, social service organizations, employer and employee organizations, and related groups that serve educational, benevolent, fraternal, religious, charitable, social, or reformatory purposes.



(c) The nonprofit community service organization has as its principal functions the following:

- (1) Consumer credit education.
- (2) Counseling on consumer credit problems and family budgets.
- (3) Arranging or administering debt management plans. “Debt management plan” means a method of paying debtor’s obligations in installments on a monthly basis.
- (4) Arranging or administering debt settlement plans. “Debt settlement plans” means a method of paying debtor’s obligations in a negotiated amount to each creditor on a one-time basis.

(d) The nonprofit community service organization receives from a debtor no more than the following maximum amounts to offset the organization’s actual and necessary expenses for the services described in subdivision (c): a one-time sum not to exceed fifty dollars (\$50) for education and counseling combined in connection with debt management or debt settlement services; and for debt management plans, a sum not to exceed 6.5 percent of the money disbursed monthly, or twenty dollars (\$20) per month, whichever is less, and for debt settlement plans a sum not to exceed 15 percent of the amount of the debt forgiven for negotiated debt settlement plans. Nonprofit community service organizations shall not require any upfront payments or deposits on debt settlement plans and may only require payment of fees once the debt has been successfully settled. For purposes of this subdivision, a household shall be considered one debtor. The fees allowed pursuant to subdivision (d) of Section 12104 shall be the only fees that may be charged by a nonprofit community service organization for any services related to a debt management plan or a debt settlement plan.

(e) The nonprofit community service organization maintains and keeps current and accurate books, records, and accounts relating to its business in accordance with generally accepted accounting principles, and stores them in a readily accessible place for a period of no less than five years from the end of the fiscal year in which any transactions occurred.

(f) The nonprofit community service organization deposits any money received from a debtor for the services described in subdivision (c) in a noninterest-bearing trust account in a federally insured state or federal bank, savings bank, savings and loan association, or credit union. The nonprofit community service organization shall provide the commissioner the following prior to engaging in business in this state and claiming this exemption:

- (1) A written notice with the name, address, and telephone number of the bank, savings bank, savings and loan association, or credit union where the trust account is maintained, and the name of the account and



the account number. The account information required in this paragraph shall be kept confidential pursuant to the laws governing disclosure of public records, including the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code, and the rules adopted thereunder.

(2) An irrevocable written consent providing that upon the commissioner taking possession of the property and business of the nonprofit community service organization, all books, records, property and business, including trust accounts and any other accounts holding debtors' funds, shall be immediately turned over to the commissioner or receiver appointed pursuant to this division. The consent shall be signed by the nonprofit community service organization and the bank, savings bank, savings and loan association, or credit union where the trust account is maintained. The consent shall be binding upon the nonprofit community service organization and the bank, savings bank, savings and loan association, or credit union, and any objection to it must be raised pursuant to the laws of the State of California and only in the forum in which the proceeding to take possession or appointment of the receiver has been filed. The nonprofit community service organization and the bank, savings bank, savings and loan association, or credit union shall further consent to the jurisdiction of the commissioner for the purpose of any investigation or proceeding under Sections 12105 and 12106 or any other provision of this division. The consent required by this paragraph shall include the name, title, and signature of an official of the bank, savings bank, savings and loan association, or credit union holding the authority to consent on behalf of such institution, and the name, title, and signature of the chief executive officer or president of the nonprofit community service organization.

(g) The nonprofit community service organization maintains at all times a surety bond in the amount of twenty-five thousand dollars (\$25,000), issued by an insurer licensed in this state. The bond shall be conditioned upon the obligor faithfully conforming to and abiding by the provisions of Section 12104 of the Financial Code, honestly and faithfully applying all funds received, honestly and faithfully performing all obligations and undertakings required under this section, and paying to the state and to any person all money that becomes due and owing to the state or to any person owed by the obligor of the bond.

(h) The nonprofit community service organization reports all of the following to the debtor at least once every three months, or upon the debtor's request, for any debt management plan or debt settlement plan:

- (1) Total amount received from the debtor.
- (2) Total amount paid to each creditor.



(3) Total amount any creditor has agreed to accept as payment in full on any debt owed by the debtor.

(4) Any amount paid to the organization by the debtor.

(5) Any amount held in reserve.

(i) The nonprofit community service organization submits to the commissioner, at the organization's expense, an audit report containing audited financial statements covering the calendar year or, if the organization has an established fiscal year, then for that fiscal year, within 120 days after the close of the calendar or fiscal year.

(j) The nonprofit community service organization submits with the annual financial statements required under subdivision (i) a declaration that conforms to Section 2015.5 of the Code of Civil Procedure, is executed by an official authorized by the board of the organization, and that states that the organization complies with this section. The annual financial statements shall also include a separate written statement that identifies the name, address, contact person, and telephone number of the organization.

(k) The nonprofit community service organization maintains accreditation by an independent accrediting organization, including either the Council on Accreditation or the International Standards Organization, with sector certification.

(l) The nonprofit community service organization does not engage in any act or practice in violation of Section 17200 or 17500 of the Business and Professions Code.

(m) The nonprofit community service organization inserts the following statement, in not less than 10-point type, in its debt management plan and debt settlement plan agreements: "Complaints related to this agreement may be directed to the California Department of Corporations. This nonprofit community service organization has adopted best practices for debt management plans and debt settlement plans, and a copy will be provided upon request."

(n) The nonprofit community service organization adopts and implements on a continuous basis policies or procedures of best practices that are designed to prevent improper debt management or debt settlement practices and prevent theft and misappropriation of funds. Failure to do the following shall constitute improper debt management or debt settlement practices, as applicable:

(1) Obtain counselor certification conducted by a nationally recognized third party certification program that certifies that all of the agency's counselors receive proper training and are qualified to provide financial assistance prior to performing counseling services in this state.



(2) Disburse funds no later than 15 days after receipt of valid funds, or by a scheduled reimbursement date, whichever is the greater amount of time.

(3) Transmit funds utilizing electronic payment processing when available.

(4) Implement an inception date policy, which shall include an agreement that a consumer's first disbursement pursuant to a debt management plan shall be received within six weeks of agreeing to the debt management plan service. The debt management plan shall include all items described in subdivision (h) and shall be provided to the consumer at the inception date of the plan. A description of best practices of the agency and of the consumer complaint resources shall be issued no later than the first payment date.

(5) Respond to and research any complaint initiated by a consumer within five business days of receipt of the complaint.

(6) Prohibit a policy requiring debt management plan consumers from being required to utilize additional ancillary services.

(7) Provide consumer access to debt management plan services regardless of the consumer's ability to pay fees related to the debt management plan, lack of creditor participation, or the amount of the consumer's outstanding debt.

(o) The nonprofit community service organization provides a copy of the best practices described in subdivision (n) to its debtor, upon request.

(p) The nonprofit community service organization resolves in a prompt and reasonable manner complaints from debtors relating to the organization's debt management plans or debt settlement plans.

(q) The nonprofit community service organization provides written notice to the commissioner within 30 days of dissolution or termination of engaging in the activities of a prorater, as defined in Section 12002.1.

SEC. 5. Section 12105 is added to the Financial Code, to read:

12105. (a) Whenever it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this division, or any rule or order promulgated pursuant to this division, the commissioner may, at his or her discretion, bring an action in the name of the people of the State of California in the superior court to enjoin the acts or practices or to enforce compliance. Upon a proper showing, a permanent or preliminary injunction, a restraining order, or a writ of mandate shall be granted and a receiver or conservator may be appointed for the defendant's assets.

(b) If the commissioner determines it is in the public interest, the commissioner may include in any action under this division a claim for ancillary relief, including, but not limited to, a claim for restitution or disgorgement or damages on behalf of the persons injured by the act or



practice constituting the subject matter of the action, and the administrative or civil court shall have jurisdiction to award an additional relief.

(c) The commissioner may, after appropriate notice and opportunity for hearing, levy administrative penalties against any person or licensee who violates any provision of this division, or rule or order promulgated pursuant to this division, in an amount not to exceed two thousand five hundred dollars (\$2,500) per violation. Any hearing shall be held in accordance with the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the commissioner shall have all of the powers granted under this act. If no hearing is requested within 30 days from the date of service of the order, the order shall become final.

(d) Any licensee or person who willfully violates any provision of this division, or any rule or order thereunder, shall be liable for a civil penalty not to exceed ten thousand dollars (\$10,000) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the commissioner in any court of competent jurisdiction.

(e) In any action brought under this division, the commissioner is entitled to receive costs, which in the discretion of the administrative or civil court shall include an amount representing reasonable attorney's fees and any related expenses for services rendered.

SEC. 6. Section 12106 is added to the Financial Code, to read:

12106. (a) The commissioner may do the following, at his or her discretion:

(1) Make public or private investigations within or outside of this state necessary to determine whether any person has violated, or is about to violate, any provision of this division or any rule or order promulgated pursuant to this division, or to aid in the enforcement of the law.

(2) Make public any information concerning any violation of this division or any rule or order promulgated pursuant to this division.

(b) For the purpose of any investigation or proceeding under this section, the commissioner or any officer designated by the commissioner may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records the commissioner deems relevant or material to the inquiry.

(c) In case of refusal to obey a subpoena issued to a person, the superior court may upon application by the commissioner issue to the person an order requiring the person to appear before the commissioner, or an officer designated by the commissioner, and produce documentary



evidence, if so ordered, or to give evidence touching the matter under investigation or in question. Failure to obey the order of the court may be punished by the court as a contempt.

(d) No person is excused from attending or testifying, or from producing any document or record, before the commissioner or in obedience of a subpoena of the commissioner, or any officer designated by the commissioner, or in any proceeding instituted by the commissioner, on the ground that the testimony or evidence required of the person may incriminate the person or subject the person to a penalty or forfeiture. However, after validly claiming the privilege against self-incrimination, no individual may be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing for which the person is compelled to testify or produce pursuant to this section, except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed in testifying.

(e) The cost of any review, examination, audit, or investigation made by the commissioner under this section shall be paid to the commissioner by the person subject to the review, examination, audit, or investigation, and the commissioner may maintain an action for the recovery of these costs in any court of competent jurisdiction. In determining the cost, the commissioner may use the actual amount of the salary or other compensation paid to the persons making the review, examination, audit, or investigation plus the actual amount of expenses, including overhead reasonably incurred in the performance of the work.

SEC. 7. Section 12107 is added to the Financial Code, to read:

12107. (a) If, upon inspection or investigation, based upon a complaint or otherwise, the department has cause to believe that a person is engaged in business without a license, or a person or licensee is violating any provision of this division or any rule or order promulgated pursuant to this division, the department may issue a citation to that person in writing describing with particularity the basis of the citation. Each citation may contain an order to desist and refrain and an assessment of an administrative penalty not to exceed two thousand five hundred dollars (\$2,500). All penalties collected under this section shall be deposited in the State Corporations Fund.

(b) The sanctions authorized under this section shall be separate from, and in addition to, all other administrative, civil, or criminal remedies.

(c) If within 30 days from the receipt of the citation, the person cited fails to notify the department that the person intends to request a hearing as described in subdivision (d), the citation shall be deemed final.



(d) Any hearing under this section shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(e) After the exhaustion of the review procedures provided for in this section, the department may apply to the appropriate superior court for a judgment in the amount of the administrative penalty and order compelling the cited person to comply with the order of the department. The application shall include a certified copy of the final order of the department and shall constitute a sufficient showing to warrant the issuance of the judgment and order.

SEC. 8. Section 12108 is added to the Financial Code, to read:

12108. (a) The remedies available to the commissioner pursuant to this division are not exclusive and may be sought and employed in any combination deemed advisable by the commissioner to enforce the provisions of this division.

(b) Any amounts collected by the commissioner in any action shall be paid into the State Corporations Fund.

SEC. 9. Section 13978.6 of the Government Code is amended to read:

13978.6. (a) The Secretary of the Business, Transportation and Housing Agency shall be generally responsible for the sound fiscal management of each department, office, or other unit within the agency. The secretary shall review and approve the proposed budget of each department, office, or other unit. The secretary shall hold the head of each department, office, or other unit responsible for management control over the administrative, fiscal, and program performance of his or her department, office, or other unit. The secretary shall review the operations and evaluate the performance at appropriate intervals of each department, office, or other unit, and shall seek continually to improve the organization structure, the operating policies, and the management information systems of each department, office, or other unit.

(b) There is in the Business, Transportation, and Housing Agency a Department of Corporations, which has the responsibility for administering various laws. In order to effectively support the Department of Corporations in the administration of these laws, there is hereby established the State Corporations Fund. All expenses and salaries of the Department of Corporations shall be paid out of the State Corporations Fund. Therefore, notwithstanding any provision of any law administered by the Department of Corporations declaring that fees, reimbursements, assessments, or other money or amounts charged and collected by the Department of Corporations under these laws are to be delivered or transmitted to the Treasurer and deposited to the credit of the General Fund, on and after July 1, 1992, all fees, reimbursements,



assessments, and other money or amounts charged and collected under these laws and attributable to the 1992–93 fiscal year and subsequent fiscal years shall be delivered or transmitted to the Treasurer and deposited to the credit of the State Corporations Fund.

(c) Funds appropriated from the State Corporations Fund and made available for expenditure for any law or program of the Department of Corporations may come from the following:

(1) Fees and any other amounts charged and collected pursuant to Section 25608 of the Corporations Code, except for fees and other amounts charged and collected pursuant to subdivisions (o) to (r), inclusive, of Section 25608 of the Corporations Code.

(2) Fees collected pursuant to subdivisions (a), (b), (c), and (d) of Section 25608.1 of the Corporations Code.

SEC. 10. It is the intent of the Legislature in passing Sections 1 to 8, inclusive, of this act to clarify and enhance consumer protections applicable to nonprofit consumer credit counseling organizations that claim the exemption from licensure as proraters when engaging in debt management or debt settlement plans, to expand the enforcement powers and remedies of the Department of Corporations to help ensure compliance by proraters and other persons licensed or exempt from licensure, and to provide the department with authority to recover its costs directly from those persons who are subject to the department's actions in enforcing existing law. Section 9 of this act is intended to provide flexibility to fund all of the Department of Corporation's laws and programs using specified fees and other amounts charged and collected pursuant to the Corporate Securities Law of 1968.

SEC. 11. The Department of Corporations shall conduct a study of the consumer credit counseling industry in California and make recommendations to the Legislature on or before March 1, 2003, regarding the establishment of fees for debt management plans and debt settlement plans. This study shall be conducted in consultation with the consumer credit counseling industry and consumer organizations.

